COMMENTS BY SOUTH DELTA WATER AGENCY ON
"A MODEL WATER TRANSFER ACT FOR CALIFORNIA", MAY 1996
BY THE BUSINESS ROUNDTABLE, CHAMBER OF COMMERCE, FARM BUREAU,
AND MANUFACTURES ASSOCIATION

Introduction

The South Delta Water Agency ("SDWA") strongly opposes the "Model Water Transfer Act for California". Although there is nothing wrong in principle with transfers of water in order to help ease the growing water crisis in California, the Model Water Transfer Act ("Act") fails to address many relevant issues and in fact exacerbates many current and ongoing problems facing many of the smaller users of water in California.

Because the development of new water has become tremendously expensive, purchases and transfers of water are gaining in popularity. The concept of a free market in water is an attractive way to address shortages by letting the market allocate this limited resource.

A completely free market, however, is not possible due to society's determination that such things as fish and wildlife preservation are also entitled to protection even though they do not fund themselves.

Similar concerns of potential harm to other public and private interests not involved in a particular transfer must also be considered before large scale changes are made to existing California Water Law. The desire to expedite and encourage water transfers should not result in laws that harm current and future water users, result in a detriment to agriculture, or preclude the development of large areas of the state.

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This proposed Act is an attempt to balance the potential benefits of facilitated water transfers versus the third party and social detriments which can result from transfers which may be deemed beneficial only by a buyer and a seller.

The Act separates short term and long term transfers, but does not adequately distinguish among transfers within a hydrologic basin and without change in purpose of use, versus transfers which move water from an area of origin to an area of water deficit and/or from agriculture to other economies.

The Act tries to strike a balance between an unbridled free market versus the limitations on free markets that are typically imposed by such things as county land zoning, air pollution controls, environmental protection statutes, numerous permit requirements, laws protecting minority interests, etc. Free markets are usually required to operated within boundaries and with social oversight when the commodity involved is both essential to much of society and in limited supply.

We believe the Act does not achieve an appropriate balance between short term benefits to those who developed the proposal, versus both the short term protection of rural economies and third partes in areas of origin, and the long term consequences to society as a whole. The proposal permits largely unrestrained changes in purpose of use (it carves out large exceptions to CEQA, the California Environmental Quality Act), thereby providing reliability for urban users at the expense of reliability for agricultural use. This threatens the sustainability of the agricultural infrastructure needed by others than the buyers and

sellers. It is cheaper in the short run for urbans to buy water from agriculture rather than to develop new water yield or even go to extensive demand reduction. However, the free market will not react fast enough as the population grows to inhibit this type of transfer before the price of food rises, and it is then too late to develop new yield.

Buyers And Sellers Can Not Be Relied On To Protect Third Party And Broad Social Interests

In most instances, buyers and sellers have neither the incentive nor, often, the technical knowledge to see that other interests are protected. Currently, CEQA and California Water Law impose broad requirements to insure any transfer does not do harm. In the case of transfers within a district or between agricultural districts that use exported water the districts can probably be relied on for oversight. Even transfers among State and Federal contractors from agricultural to environmental or urban use will have some oversight if there is no governmental coercion to transfer. However, it is doubtful that other transfers (that would become popular under the proposed Act) will have adequate oversight unless expanded SWRCB approval is required.

Protection Of Downstream Diverters

Downstream diverters and rural communities will not be protected if they are not notified of a proposed transfer by an upstream diverter or a transfer that may affect the rural economy. Notice in a back page of a newspaper as required by the Act is not

an effective notice. There must be direct notification of parties at risk.

Short Term Exemptions

The proposals for oversight exemptions for "short term" transfers ignore the ease with which the long term provisions can then be avoided. For example, the two year limit on short term transfers could be avoided by two sellers arranging with two buyers to swap customers every two years.

Burden Of Proof

We strongly oppose shifting the burden of proof to damaged parties. This is not only unfair, but any potentially damaged party will lack the financial and technical ability to defend themselves against major adversaries. Furthermore, they may have difficulty in getting the transferors to provide necessary information. (See later discussion of conservation and of return flows).

Determination Of Whether Water Being Transferred Is Either Salvaged Or A Result Of Reduced Water Consumption

It has been our experience that upstream transfer proposals are often based on alleged "conservation" by more efficient water application, but with no actual reduction in water consumption and no salvage of water otherwise lost. The result is that they sell water that previously was put to use by downstream users. At this time, some potential transferors are refusing to reveal details of their operations in order to hide the downstream effects. Third

parties would be severely handicapped if they then bear the burden of proof.

Return Flows

Diversions for upstream agricultural use generate substantial surface and subsurface return flows to the stream system, and also provide groundwater recharge to supply cities which otherwise would use surface water. If this diverted water is used instead for fish flows or for delivery to non-agricultural users, the seller is in part selling return flow water needed by downstream diverters in summer months. These effects are complex and the burden of proof must not be placed on downstream parties who may not have the data or the expertise to prove and quantify the impact.

Permanent Transfers

Proposals for permanent transfers should be disfavored. Even the vast state and federal projects are limited by area of origin and watershed protection laws that protect future users in the areas where the water originates. If allowed at all, there should be no expedited process for such a transfer, rather there should be at least the same level of scrutiny as would be given to an application for a new appropriation.

Transfer Of Riparian Water Rights

Any provision for transferring some riparian rights may place all riparian rights in jeopardy. Section 207 of the Act allows for the transfer of riparian rights (that have been quantified under Water Code Sections 2500 et.seq.). Current law precludes transfers

of riparian rights although a riparian right can be reallocated or limited by way of a grant. The Act raises two issues; policy considerations and abuses.

The policy considerations deal with examining the effects of such a change in the law. Currently agricultural and rural communities pay from $0 to $250 per acre foot for water. Large urban areas sometimes pay $500, $600 and more per acre foot. If a riparian right is temporarily or permanently transferred at a $500 per acre foot cost, agricultural and rural economies will never be able to "out bid" or buy back the water. Thus the areas in which the water originates will in fact lose their right to use the water and be precluded from further growth if not further existence. Current riparian law has as its purpose to guarantee that the areas in which the water originates will have water available for future use. Changing this is a complete reversal, not a minor adjustment to California Water Law.

Similarly, riparian use on a stream is what determines how much is available for junior permitted appropriators. A transferee of a riparian right under the Act would jump ahead of permitted appropriators on the priority scale. (Less riparian use on a stream would normally make more water available to both other riparians and permitted appropriators.)

The abuse issue deals with overcoming Section 207's limitation on transferring only judicially quantified riparian rights. Again, economics will take over. If it is cheaper to fund a judicial determination of rights on a stream than it is to develop alternate sources of water (e.g. desalination plants produce water at a cost

of approximately $2,000 per acre foot), then large urban interests will seek more and more judicial quantifications. Hence, a narrow exception in the proposed Act may become a huge loophole.

Section 402 of the Act states:

> "The Board shall not have jurisdiction over any other transfers of water unless the water right holder requests the Board to exercises jurisdiction pursuant to Sections 403 and 404".

Does this mean a riparian can acquiesce to the SWRCB's exercising jurisdiction over a transfer of his water under this Act? If so, then virtually all riparian rights can become subject to this Act; it just becomes a question of how much money.

Through Delta Transfers

If water is designated or sold for fish and wildlife purposes from a San Joaquin tributary and is then recaptured for export, is that a "through Delta transfer" under the Act? Is the sale really for fish or for export or both? Who pays and who is responsible for impacts? The Act provides no guidance and would appear to facilitate expedited transfers for fish and wildlife, which then become exports after they pass a certain point.

Groundwater Sales

There should be no exceptions to the prohibition of sale of non-banked water from a "critical" groundwater basin, and any sale from a non-critical basin must terminate whenever the basin is found to be overdrafted.

A Petition Must Do More Than Protect Against "Likely" Impacts And The Proposed Shortened Reviewed Time Is Unrealistic

Section 403 of the Act sets forth the procedure for review by the SWRCB of a proposed transfer . Subsection (a) describes the petition that begins the process. The petition is supposed to set forth the changes "likely to occur as a result of the proposed transfer". The petition is granted unless the Board determines the transfer "would result in significant injury to any legal user of water" or "would unreasonably affect... other instream beneficial uses".

This is a tremendous change to current law. CEQA requires the petitioner to evaluate whether or not there may be significant effects on the environment. The Project must then mitigate adverse impacts, or specify why impacts are not significant. CEQA puts the burden on the petitioner whereas Section 403 puts the burden (for short term transfers) on the protestants. The net result of this is that the transferor need merely allege no "likely" adverse effects and it then becomes a protestant's obligation to do a CEQA-type review in order to prevail. Under current law the petitioner must examine and discuss potential impacts. Under this Act he must only examine "likely" effects.

Worse still, the protestants have an unrealistically short time to do their review and investigation. Whether for a short term or a long term transfer, protestants must file their protest within forty days of the petition, and then have only twenty days to respond to the Board's analysis of the petition. Anyone who has previously been involved in the CEQA process or the Water Code

Section 1701 permit change process realizes that these shortened time frames preclude meaningful participation. [Without a substantial increase in staff and funding, the Board's analysis would be cursory at best.]

Long term transfers have slightly longer time frames, for Board analysis, but the same time frame for protestants to comment. This provides no meaningful participation especially for a permanent transfer of water. By way of example, both CEQA and Section 1701 processes always take at least a year. Even then it is difficult to conduct adequate investigation or review on complicated issues.

Although the long term transfer keeps the burden on the petitioner, that obligation is significantly lessened because the test under the Act is less than CEQA requirements, and because protestants have a limited amount of time to evaluate the issues and data.

Repealed Statutes

Strangely, the proposed Act seeks to repeal Water Code Sections 1700-1707. Sections 1701 and 1702 deal with all changes in place, time, and use of water under permits. Repealing these Sections leaves non-transfer changes with no statutory review criteria.

Section 1702 is itself an important protection for all water users. By changing the test and shifting the burden, the Act changes the emphasis from protecting third parties to favoring transfers. This change will allow both the Board and the courts to label harms as "unlikely" or "not significant" in order to allow

transfers. Current law has the Board and courts err on the side of protecting third parties because of the heavy burden placed on the petitioners.

Compensation Of Parties Injured By Expedited Transfers Of Conserved Water

Section 505 and 506 of the Act are truly extraordinary substitutions for CEQA Law. Under current CEQA Law, a petitioner must examine all potential effects and can only proceed if the effects are not significant, or if they are mitigated. This occurs before the project begins.

Under this Act, the petitioner submits a copy of the Transfer Agreement and then verifies its calculations of the conserved water. "Any interested party may submit written comments" and then the Board decides in thirty days whether to allow the transfer.

Should this even more shortened process result in an error, relief is limited to $5 an acre foot, the amount required as security under the Act. There is no judicial review. This unrealistic limit on damages is actually a condemnation of a property right that avoids paying just compensation. In addition, it again requires the damaged party to bear the burden of proof.

This section of the Act has numerous other serious problems that need evaluation if not outright removal. For example, a party may have no water right but be getting water under a contract; the Act allows the sale of this water with no judicial review. Also, the transferor can avoid liability for damage if the damage is allegedly due to changes in operations of other facilities. Who

is responsible if the damage is a result of an accumulation of many expedited transfers?

Conclusion

Water transfers do not create water. Central Valley water is already fully committed much of the time so increased exports from the valley should be based on new yield rather than reallocation.

The Act attempts to set forth clear and straight-forward steps to allow water transfers to become more prevalent. However, a review of the Act reveals that the drafters have not considered many likely effects that will result. The Act will make it even more difficult for small water users to protect their interests and will make certain the transfer of water from agriculture and rural communities to large urban centers. The shifting of the burden and the lessening of the evaluation and investigation process set forth in the Act, suggests that the above effects are intended results. Regardless, the SDWA will strenuously oppose the Act in its current form.

Submitted by:

SOUTH DELTA WATER AGENCY

Dated: June 26, 1996

Alex Hildebrand
Alex Hildebrand, Secretary

BREWER, PATRIDGE, GERLOMES
& HERRICK

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JOHN HERRICK, Attorneys for
SOUTH DELTA WATER AGENCY

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